No. 80380-3

MADSEN, J. (dissenting)—I agree with the majority that "[f]irst degree assault does not, under all circumstances, require that the specific intent match a specific victim." Majority at 6. And I continue to agree with this court's decision in *State v. Wilson*, 125 Wn.2d 212, 883 P.2d 320 (1994). I cannot agree, however, that the rule articulated in *Wilson*, the first degree assault statute itself, or the doctrine of transferred intent supports convictions against Ali Elmi for first degree assault of the uninjured children in this case.

To convict Elmi of first degree assault, the State must prove all elements in RCW 9A.36.011. As the majority notes, "[t]he term 'assault' . . . constitutes an element of the crime of first degree assault." Majority at 6. There are three common law definitions of assault. Because the children were unharmed, the State must prove either the second or third definitions of assault: that Elmi attempted, with unlawful force, to injure the children (attempted battery) or attempted to create in the children apprehension of fear and bodily injury (apprehension of harm). Majority at 6-7 (citing *State v. Smith*, 159 Wn.2d 778, 788, 154 P.3d 873 (2007)). Under any definition of assault, the first degree assault statute requires the State to prove Elmi's intent to inflict great bodily harm on the children. RCW 9A.36.011(1)(a).

The majority analyzes *Wilson* against the facts of this case to hold, "in accord with *Wilson*," that once the State establishes Elmi's intent to harm Fadumo Aden, "the mens rea is *transferred* under RCW 9A.36.011" to the children. Majority at 10-11 (emphasis added). While I agree with the majority that the first degree assault statute embodies the doctrine of transferred intent, I do not agree that Elmi's convictions for assaulting the children can be affirmed under the statute or the precedent established in *Wilson*. I also disagree that we can proceed under RCW 9A.36.011 without analysis of the doctrine of transferred intent. The majority acknowledges that RCW 9A.36.011"encompasses transferred intent." Majority at 11. However, they dismiss discussion of the doctrine altogether. I respectfully cannot see how this court can grant Elmi's "petition for review on the issue of transferred intent" and refuse to discuss application of the doctrine under the statute. Majority at 1. Therefore, I respectfully dissent.

Transferred Intent

The doctrine of transferred intent was developed at common law in order to provide a mechanism to find a defendant who shoots at B but misses and *hits* C instead "just as guilty as if his aim had been accurate." 1 Wayne R. LaFave, *Substantive Criminal Law* § 6.4(d), at 473 (2003). Indeed, the very reason for the doctrine is to relieve the prosecution of proving the defendant intended to injure an unintended victim. *See State v. Neighbors*, noted at 82 Wn. App. 1075, 1996 WL 493184, at *2 n.1 (unpublished opinion) ("Defendants . . . object to the State's use of the [transferred intent] doctrine because it relieves the State of its burden of proving specific intent to injure a specific victim.") (citing *State v.*

Salamanca, 69 Wn. App. 817, 825-27, 851 P.2d 1242, *review denied*, 122 Wn.2d 1020 (1993)); John P. Einwechter, *New Developments in Substantive Criminal Law Under the Uniform Code of Military Justice*, 1998 Army Law. 20, 23 ("[U]sing the doctrine of transferred intent to multiply liability for attempted murder gives the government a free ride by relieving it of its constitutional burden of proving the accused's guilt on every element of the offense beyond a reasonable doubt.").

In *Wilson* this court recognized that RCW 9A.36.011 *codifies* the doctrine of transferred intent and makes application of the doctrine a function of the statute instead of a function of the common law: "once the intent to inflict great bodily harm is established . . . the mens rea is *transferred under* RCW 9A.36.011 to any unintended victim." *Wilson*, 125 Wn.2d at 218 (emphasis added); *State v. Johnson*, 147 Wn. App. 276 (unpublished portion) ¶ 46, 194 P.3d 1009 (2008) ("As our Supreme Court explained in *Wilson*, so far as first degree assault is concerned, the doctrine of transferred intent had been codified by RCW 9A.36.011."). However, there is nothing in RCW 9A.36.011 to suggest that the legislature intended to codify a concept broader than the common law doctrine that would allow multiple first degree assault convictions to stand where there is proof that the person the defendant intended to assault was in fact assaulted and no unintended victim received actual injury.

Indeed, chapter 9A.36 RCW clearly evinces the legislature's intent to criminalize acts of physical harm and adjusts a defendant's potential culpability according to the act and his mental state. RCW 9A.36.012—.041 (criminalizing the acts of second, third, and fourth degree assault as well as drive-by

shooting and reckless endangerment). It is clear from the legislature's scheme, which punishes commensurate with mental culpability, that the statute was not intended to reach beyond the scope of the common law concept to impose multiple punishments where no unintended victim received injury. Simply put, the doctrine of transferred intent, whether at common law or as codified, is not and never has been intended to apply in circumstances where no unintended victim is injured.

Wilson, the sole Washington case relied upon by the majority, is in accord. Although the majority recognizes that "*Wilson* is distinguishable to the extent that the case involved an actual battery," it nonetheless finds *Wilson* applicable to the circumstances here where no actual battery occurred. Majority at 10. But the factual distinction in *Wilson* is critical. *Wilson* relied on the actual injuries suffered by the unintended victims to prove the defendant's specific intent to inflict great bodily harm: "we are persuaded that Wilson assaulted Hurles and Hensley [the unintended victims] in the first degree when . . . Wilson discharged bullets from a firearm *into the neck* of Hurles and *into the side* of Hensley." *Wilson*, 125 Wn.2d at 218. Thus, in fact, *Wilson* did not apply the first degree assault statute beyond the reaches of the common law doctrine.[1]

Indeed, one reason the doctrine generally has not been applied to instances where no one is injured is that without actual injury, evidence of the defendant's specific intent

[1] I respectfully disagree with the majority that *Wilson* can be broadened to cases where no one is injured simply because "[t]he assault statute provides for the various methods of assault to be treated equally." Majority at 10. As the majority notes, "assault" is not defined in the criminal code and courts have instead turned to the "common law for its definition." *Id*. at 6. As the statute makes no mention of the various "methods" or definitions of assault, guidelines for their treatment and interrelation to the doctrine of transferred intent must come from the common law.

to "inflict great bodily harm" is difficult to prove. As one Washington court has noted:

> [a] majority of jurisdictions have extended the scope of the crime of assault to include, *in addition to* (not as an alternative to) the attempted-battery type of assault, the tort concept of the civil assault, which is committed when one, with intent to cause a reasonable apprehension of immediate bodily harm (though not to inflict such harm), does some act which causes such apprehension. It is sometimes stated that this type of assault is committed by an act (or by an unlawful act) which reasonably causes another to fear immediate bodily harm. This statement is not quite accurate, however, for one cannot (in those jurisdictions which have extended the tort concept of assault to criminal assault) commit a criminal assault by negligently or even recklessly or illegally acting in such a way (as with a gun or a car) as to cause another person to become apprehensive of being struck. There must be an a*ctual intention to cause apprehension*, unless there exists the morally worse intention to cause bodily harm.

State v. Krup, 36 Wn. App. 454, 458-59, 676 P.2d 507 (1984) (second emphasis added) (quoting Wayne R. LaFave & Austin W. Scott, Jr., *Handbook on Criminal Law* 611 (1972)).

I respectfully disagree with the majority that RCW 9A.36.011 can be broadened to cases where unknown victims suffer no injury simply because "the intent is the same." Majority at 11. "'Evidence of intent . . . is to be gathered from all of the circumstances of the case, including not only the manner and act of inflicting the wound, but also the nature of the prior relationship and any previous threats.'" *Wilson*, 125 Wn.2d at 217 (alteration in original) (internal quotation marks omitted) (quoting *State v. Ferreira*, 69 Wn. App. 465, 468, 850 P.2d 541 (1993)). "Specific intent cannot be presumed, but it can be inferred as a *logical probability* from all the facts and circumstances." *Id.* (emphasis added). A solid evidentiary basis for a defendant's intent is necessary because the law requires that a defendant be held

just as liable as he is culpable—no more, no less. *See* 1 LaFave, *supra*, § 6.4(d), at 473 ("In the unintended-victim . . . situation . . . it is the view of the criminal law that A is *just as guilty* as if his aim had been accurate." (emphasis added)); Allen Z. Gammage & Charles F. Hemphill, Jr., *Basic Criminal Law* 87 (2d ed. 1979) (noting that when a farmer accidentally injures his sworn enemy and later expresses pleasure at the accident, "no crime occurred" because "the farmer who caused the injury had no guilty state of mind"). Upholding a first degree assault conviction without proof of intent to inflict great bodily harm violates a defendant's right to have every element of the crime proved beyond a reasonable doubt. In the circumstances of this case, the intent is not the same.

The majority's extension of the doctrine of transferred intent to the case of attempted battery is particularly problematic. Assault by attempted battery is defined as "'an attempt, with unlawful force, to inflict bodily injury upon another, accompanied with the apparent present ability to give effect to the attempt if not prevented.'" *State v. Byrd*, 125 Wn.2d 707, 712, 887 P.2d 396 (1995) (quoting *Howell v. Winters*, 58 Wash. 436, 438, 108 P. 1077 (1910)). By the terms of its definition and Washington case law, assault by attempted battery requires proof of specific intent to cause bodily injury. *Byrd*, 125 Wn.2d at 713; *State v. Frazier*, 81 Wn.2d 628, 631, 503 P.2d 1073 (1972). As a crime of attempt, first degree assault by attempted battery sanctions what a defendant intended to do but did not accomplish, not the defendant's unintended and unaccomplished potential consequences. Using the transferred intent doctrine to hold a defendant liable for inchoate crimes like attempted battery criminalizes the unintended and unaccomplished potential consequences

of a defendant's actions.

This reasoning finds significant support in other jurisdictions. In *Ford v. State*, 330 Md. 682, 625 A.2d 984 (Ct. App. 1993), the Maryland Court of Appeals refused to apply the doctrine of transferred intent to uphold assault convictions against a defendant convicted of multiple counts of assault and battery, among other charges, for throwing rocks at moving vehicles on a highway. Noting that the "purpose of transferred intent is to link the mental state directed towards an intended victim, i.e., the intent to kill, maim, or disable that person, with the actual harm caused to another person," *id*. at 710, the court held the doctrine inapplicable "[*w*]*here the crime intended has actually been committed against the intended victim, transferred intent is unnecessary and should not be applied to acts against unintended victims*." *Id*. at 712 (emphases added).

In *State v. Hinton*, 227 Conn. 301, 305, 630 A.2d 593 (1993), the defendant fired one shot from a sawed-off shotgun loaded with "triple ought" buckshot. This one shot contained eight pellets and killed three people while injuring one other. *Id.* The defendant was convicted at trial of three counts of murder (for the three murdered victims), one count of capital felony (for use of a firearm), one count of attempted murder (for the nonfatally injured victim), and one count of assault (also for the nonfatally uninjured victim). *Id.* at 302-03. The Connecticut Supreme Court refused to uphold the trial court's application of the doctrine of transferred intent and overturned the defendant's attempted murder and assault in the first degree convictions. *Id.* at 317-18. In overturning the attempted murder conviction, the court noted that a very small number of jurisdictions apply the doctrine of

transferred intent to attempt crimes and held that the "*rule of lenity leads us to conclude that the transferred intent doctrine should not be applied*" to attempt crimes. *Id.* at 317 (emphasis added).

In *People v. Bland*, 28 Cal. 4th 313, 317, 48 P.3d 1107 (2002), the defendant intended to kill and did kill one victim. The defendant also injured, though did not kill, two unintended victims. Noting that "[t]he business of 'transferring'" mens rea is more complex for inchoate crimes, the California Court of Appeals held that doctrine does not extend to "unintended victims to an inchoate crime like attempted murder." *Id.* at 326-27. "The crime of attempt sanctions what the person intended to do but did not accomplish, not unintended and unaccomplished potential consequences." *Id.* at 327.

Similarly, in *State v. Johnson*, 205 Ariz. 413, 417-18, 72 P.3d 343 (2003), the Arizona Supreme Court reversed a trial court ruling that where "'the result of the shot [at a police officer on the street near bystanders] caused those standing around to be in reasonable apprehension of imminent physical injury, . . . the proper concept in that situation is transferred intent.'" *Id*. at 416. The Supreme Court held that "[*i*]*t cannot be presumed from the act of firing a shot at Officer D that Johnson also intended to scare Officer D or any of the bystanders*." *Id.* at 418 (emphasis added).

As other courts have observed, use of the doctrine in a case where no unintended victim is injured makes a defendant's potential liability limitless.[2] *See Ford*, 330 Md. at

[2] Neither the majority nor the State cites a mechanism by which the potential criminal liability of a defendant can be limited where the doctrine of transferred intent is used to prove intent against unintended, unharmed victims. If Aden had planned a gathering of 12 people at her home the evening Elmi fired shots into the room, under the majority's reasoning he would have been guilty

712 ("[T]ransferred intent makes a whole crime out of two halves by joining the intent as to one victim with the harm caused to another victim. Transferred intent does *not* make two crimes out of one."); *Ramsey v. State*, 56 P.3d 675, 681-82 (Alaska Ct. App. 2002) (where defendant brought a gun to school, firing multiple shots at many people and killing two, the court ruled against the State's attempt to use the doctrine of transferred intent as a means to find the defendant guilty of attempted murder of an injured victim who sat near a murdered victim at the time of the shootings. The court held that "[*t*]*he problem with the State's argument is that its logic leads to the conclusion that [defendant] could have been found guilty of the attempted murder of everyone in the school*." (emphasis added)). Using Elmi's intent to harm Aden to uphold convictions for first degree assault of unharmed, unintended victims creates a principle of limitless liability.

Turning to assault by apprehension of harm, the majority does not address directly whether or not the specific intent required to convict must match a specific victim. To the extent the majority suggests that Elmi's intent to actually injure Aden can be transferred into a different intent—an intent to create an apprehension of harm in the children—such use of the transferred intent doctrine is inappropriate as explained above. However, even assuming first degree assault by apprehension of harm does not require the specific intent of the defendant to match a specific victim, the intent to place someone

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of 12 additional counts of first degree assault. Criminal liability would attach even if he had no knowledge of the existence or identity of the additional people inside the room or whether those individuals were aware of any threat aimed at them.

in apprehension of harm logically requires that the actor in the situation at the very least know of the person's presence.

Thus, even if the doctrine of transferred intent can be legitimately used in cases of unknown, unharmed victims, the State here still must show the children were in fact fearful of the shots and apprehended the harm. *State v. Nicholson*, 119 Wn. App. 855, 862, 84 P.3d 877 (2003) (holding that the apprehension must be felt by the victim, not some other person and that where the victim is a child who is too young to understand the danger, it is not relevant if someone else feared for the child's safety), *overruled on other grounds by Smith*, 159 Wn.2d 778; *State v. Bland*, 71 Wn. App. 345, 356, 860 P.2d 1046 (1993) (holding that fear and apprehension *after* the fact is insufficient to find an assault and that "the fear and apprehension element" cannot be "transferred along with the intent" (emphasis omitted)), *overruled in part by Smith,* 159 Wn.2d 778.

I disagree with the majority that "[w]hether or not the children comprehended that a gun was being fired, we could infer from this evidence [(the children crying on the 911 call)] that the children were put in apprehension of bodily harm." Majority at 12. None of the children, ages three to five at the time of the shooting, testified. Moreover, as in *Bland*, 71 Wn. App. 345, and *Nicholson*, 119 Wn. App. 855, the only witness, Aden, testified that she doubted the children knew what was going on and that she believed any reaction by the children was an after-the-fact response to her screams rather than the gunshots. Verbatim Report of Proceedings (Apr. 14, 2005) at 60. Because there is no evidence that the children themselves actually apprehended harm from the gunshots, the

State failed to meet its burden.

A proper application of the assault statute will not permit risky or dangerous behavior to go unpunished. In cases where no victim suffers actual injury but the defendant "creates a substantial risk of death or serious physical injury to another person[(s)]," the legislature has created the crimes of drive-by shooting or reckless endangerment. RCW 9A.36.045(1), .050; *compare* 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 35.03 (2008) (WPIC) stating that "a person commits the crime of assault in the first degree when, with intent to inflict great bodily harm, he or she assaults another *and* inflicts great bodily harm" *with* 11 WPIC 35.32 stating that "[a] person commits the crime of reckless endangerment when he or she recklessly engages in conduct that creates a substantial risk of death or serious injury to another person." These statutes directly address the difficulty of proving specific intent as required by the first degree assault statute by requiring only proof of a general intent of recklessness. This court should not expand the reach of RCW 9A.36.011 beyond that intended by the legislature in order to affirm these convictions.

Conclusion

The majority inappropriately broadens the conceptual transfer of intent codified in RCW 9A.36.011 to create a dangerously limitless principle of law: as long as the defendant has the requisite mens rea with regard to any one person, she or he "bears the risk of multiple convictions . . . regardless of whether the defendant knows of their presence." Majority at 11. Under this reasoning, the act of firing a single bullet at a single intended victim can support criminal

liability limited only by the number of people who apprehend harm from the shot. The legislature has provided other statutory options for charging a defendant who causes no injury but "creates a substantial risk of death or serious physical injury to another person[(s)]." RCW 9A.36.050. With these statutes and the conceptual difficulties that arise when intent is transferred to uninjured victims, I find it unlikely that the legislature intended the first degree assault statute as a vehicle to impose nearly limitless criminal liability. I cannot uphold Elmi's convictions of first degree assault for unintended, unknown victims.

AUTHOR:
Justice Barbara A. Madsen

WE CONCUR:

Justice Mary E. Fairhurst

Justice Richard B. Sanders